Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Policies to Promote Rural Radio Service and to) MB Docket No: 09-52
Streamline Allotment and)
Assignment Procedures)

To: The Commission

Responsive Comments of the Coquille Indian Tribe

The Coquille Indian Tribe, by and through its Tribal Attorney, submits these responsive comments to comments previously submitted by the Catholic Radio Association n the above captioned proceeding (the "Rural Radio FNPRM").
The Tribe refutes a number of claims made by the CRA.
1. The CRA Incorrectly asserts that Indian tribes are most accurately characterized as racial groups.
a. Tribes are most accurately characterized as political entities. It is well established that tribes are political entities, having sovereign status, and a government-to-government relationship with the Federal government. "Federal acknowledgement or recognition of an Indian group's legal status as a tribe is a formal political act confirming the tribe's existence as a distinct political society, and institutionalizing the government-to-government relationship between the tribe and the federal government." Cohen's Handbook on Federal Indian law ¤ 3.02[3] (2005 Ed.). Not all Indian tribes are acknowledged by the Federal government and therefore do not have the same legal relationship with the Federal government. "Recognition is a formal political act, it permanently establishes a government-to-government relationship between the United States and the recognized tribe as a 'domestic dependent nation,' and imposes on the government a fiduciary trust relationship to the tribe and its members." Id. (citing H.R. Rep. No. 103-781, 103rd Cong., 2d Sess., 2 (1994). This political and legal status is unique and a crucial aspect of Indian law that must be remembered.
i. The CRA incorrectly interprets Morton v. Mancari, 417 U.S. 535 (1974). This case dealt specifically with a federal law (the Indian Reorganization Act of 1934) that gives a hiring preference to Indians in the Bureau of Indian Affairs. The U.S. Supreme Court upheld this hiring preference against a challenge that it was repealed by the Equal Employment Opportunity Act of 1972 (Public Law 92-261), and that it violated the due process clause of the Fifth Amendment. It is not, as the CRA seems to imply, the authority for federal benefits or preferences for Indians. In fact, Morton v. Mancari establishes the the very point that the CRA seems to overlook: That tribes are political entities. The reason the hiring preference does not constitute racial discrimination in violation of the Constitution is

because it is a political classification, not a racial classification. "The preference, as applied, is granted to Indians not as a discrete racial group, but, rather as members of quasi-sovereign tribal entities..." Id. 417 U.S. at 554. "The preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes. This operates to exclude many individuals who are racially to be classified as 'Indians.' In this sense, the preference is political rather than racial in nature." Id. 417 U.S. at 553 n. 24. Similarly, the Tribal Priority of the Federal Communications Commission is applicable to federally recognized tribes, in recognition of their unique political status and government-to-government relationship with the Federal government, including federal agencies such as the FCC.

ii. Contrary to the CRA's beliefs, tribes ARE "distinguishable from other racial, ethnic, or even religious groups" because of the unique historical and legal relationship with the federal government. Tribes were independent, sovereign nations before the U.S. government was established, and entered into treaties and other agreements with the U.S. government to preserve their sovereign status. No other racial, ethnic or religious groups have this history or legal relationship with the Federal government. Whether a tribe has a reservation is irrelevant to the tribe's sovereign status. Many tribes lost their reservation lands during the termination and allotment era policies of the federal government, yet maintained their sovereign status and government-to-government relationship with the federal government. In addition, Alaska Native Corporations do not have reservations, and throughout Indian country many tribes may not have a reservation, but may still have land held in trust by the federal government, or statistical areas, or service areas that are recognized by the Federal government. Either way, a tribe's government-to-government relationship with the U.S. is not impacted by the existence of a land base and that criteria should not be used to deny to some tribes the benefits of the Tribal Priority. Tribes that may not have a reservation still govern their people and their self-determination will be enhanced through better radio broadcast opportunities. [NR1]

b. A preference for political entities need only satisfy the rational relationship test. "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violates due process." Morton v. Mancari, 417 U.S. at 555.

c. The Federal government has a well-established and broad policy of Tribal Self-Determination. President Johnson helped usher in the policy of self-determination in the late 1960's, he called for, "A goal that ends the old debate about 'termination' of Indian programs and stresses self-determination [as] a goal that erases old attitudes of paternalism and promotes partnership and self-help." Lyndon Johnson, Special Message to Congress, March 6, 1968, in Public Papers of the Presidents of the United States: Lyndon Johnson, 1968-69, 1 Pub. Papers 336. The Indian Self-Determination and Education Assistance Act of 1975 (Public Law 93-638) and the Tribal Self-Governance Act of 1994 (Public Law 103-413) further define and mandate the policy of self-determination. Tribes are encouraged and provided assistance by the Federal government through federal agencies to manage their own health, education, economic development, and social services themselves. Since the policy

of self-determination came into effect, courts have evolved a strong trust doctrine and nearly every piece of legislation dealing with Indians reaffirms the trust relationship between the Federal government and tribes. In this context, the FCC's Tribal Priority is a fulfillment of the Federal trust obligation to tribes, and just one program that exemplifies the policy of self-determination.

2. The CRS incorrectly claims that a Federally-directed tribal government preference may only be asserted to support activities that are on-reservation in character.

As noted above, a Federal policy extending a preference to Federally-recognized tribes need only satisfy the rational relationship test to survive claims that it violates the Equal Protection or Due Process Clauses of the United States Constitution. This standard of review applies whenever the Federal government provides a special treatment for Native American tribes, regardless of whether the treatment derived from Congressional legislation or executive agency action.

The Federal government has long authorized preferences for tribal governments , even in the off-reservation context. Here is but a brief samplling of such benefits:

* The Indian Self Determination and Education Assistance Act (the "ISDA") authorizes tribes to enter contracts to provide Federal services to Indians living on and off reservation. 25 U.S.C. 450 et seq. The ISDA also authroizes tribes to receive Federal excess and surplus property located on or off reservation. 25 U.S.C. 450j. Moreover, the ISDA further authorizes self-governance compactng tribes to assume management of off reservation programs operated by the Department of the Interior. 25 U.S.C. 458ff.

* The Tribal Forest Protection Act of 2004 authorizes the Forest Service to contract with Tribes to perform timber stewardship projects off of Tribal lands. 25 U.S.C. 3115.

* The Congressionally-approved Western Hemisphere Travel Initiative authorizes tribes to develop and administer "enhanced tribal identification cards" that are acceptable forms of identification for internaltional travel within the Western Hemisphere.

* The Coquille Restoraton Act created a five county service area for the Coquille Indian Tribe, and deems that area to be the Tribe's "reservation" solely for the purposes of Federal services and benefits, even though those lands are not Indian country. 25 U.S.C. 715.

There is ample evidence showing that the Federal government frequently provides services to tribal governments based on their political status.

3. The CRA incorrectly asserts that the tribal preference in the proposed rule will amount to viewpoint discrimination.

The Tribe does not have much to say on this point, other than that thes CRA's offensive and needlessly antagonistic comments reveal a true ignorance about and hostility toward Federally-recognized tribes. If the CRA was curious enough, it could have researched the radio programming currently in place in Indian country.

Centuries of non-Indian experimentation and involvement in Indian country have revealed to us, and to the U.S. Congress, that the most helpful policy approach to Native America is to advance Self-Governance. All other efforts have failed.

The proposed rule advances this now widely accepted approach to working with Indian country. The CRA would have the FCC stop or turn back the clock.

[NR1]I didn't find any authority to cite for this, and I hope I am not making it up...
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